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No. 83-1572

In the Supreme Court of the United States

OCTOBER TERM, 1983

WILLIAM FLANNERY, ETC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a permanently and totally comatose plaintiff may recover damages under the Federal Tort Claims Act for loss of the ability to enjoy life.

2. Whether damages for lost future earnings awarded in a suit under the Federal Tort Claims Act must be adjusted to reflect the federal income taxes to which future earnings would have been subject.

3. Whether, in the circumstances of this case, the damages awarded for lost future earnings and the damages awarded for all future living expenses were impermissibly duplicative.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 718 F.2d 108. The memorandum opinion of the district court (Pet. App. 36a-46a) is not reported. A prior opinion of the court of appeals certifying certain questions of state law to the West Virginia Supreme Court of Appeals (Pet. App. 30a-35a) is reported at 649 F.2d 270. The opinion of the state court (Pet. App. 15a-29a) is reported at 297 S.E.2d 433.

JURISDICTION

The judgment of the court of appeals was entered on September 21, 1983. A petition for rehearing was denied on December 27, 1983 (Pet. App. 47a). The

petition for a writ of certiorari was filed on March 23, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is the legal representative for Michael George Flannery (Flannery). As the result of a 1974 collision between an automobile in which Flannery was riding and a vehicle driven by a federal employee, Flannery suffered extensive brain damage that rendered him permanently and totally comatose. Petitioner filed suit on Flannery's behalf under the Federal Tort Claims Act (FTCA or the Act) in the United States District Court for the Southern District of West Virginia. The district court determined that the accident was caused by the negligence of the federal employee and awarded petitioner approximately $2,200,000 in damages. Pet. App. 2a, 36a.

The United States appealed only with respect to the amount of damages awarded. Specifically, the government challenged the $1,300,000 portion of the award attributable to Flannery's "loss of the ability to enjoy life" and the district court's refusal to reduce the $535,855 awarded for impairment of Flannery's earning capacity by the amount of taxes that would have been payable on that amount of income. The government argued that both of these aspects of the award represented damages that were improper under state law, excessive and punitive.

2. The court of appeals initially certified the questions of state law raised by the government's appeal to the West Virginia Supreme Court of Appeals (Pet. App. 30a-35a). The state court ruled that both elements of the damages award challenged by the government were recoverable under West Virginia

law (*id.* at 15a-29a). Following the state court's response, however, the court of appeals concluded (*id.* at 2a) that it "should have first addressed the federal questions lurking in the case." Specifically, the court of appeals acknowledged (*id.* at 3a) that a determination that a certain element of damages would be recoverable against a private defendant under state law does not answer definitively the question whether the United States may be held liable for the same element of damages under the FTCA. Rather, there remains the question whether the particular damages are punitive in nature, and therefore not recoverable under the FTCA pursuant to 28 U.S.C. 2674. The court of appeals concluded that the damages awarded by the district court violated the FTCA's proscription of punitive damages in the following three respects:

First, the court of appeals held (Pet. App. 4a-5a), because Flannery "is conscious of nothing and incapable of enjoying anything" (*id.* at 4a), and because "[t]here is no likelihood whatever that he will ever become aware of anything" (*ibid.*), the award of $1,300,000 for the loss of the ability to enjoy life is punitive and therefore not permitted under the FTCA. The court explained (*id.* at 4a-5a) that such damages "cannot provide [Flannery] with any consolation or ease any burden" and are superfluous because he already has been awarded "all of the money needed for [his] care, should he live out his life expectancy. He cannot use the $1,300,000. He cannot spend it upon necessities or pleasures. He cannot experience the pleasure of giving it away. If paid, the money would be invested and the income accumulated until Flannery's death, when it would be distributed to those surviving relatives of his entitled to inherit from him."

Second, the court of appeals held (Pet. App. 4a) that because "[a] living person, with earnings subject to federal taxation, may spend only his net income after taxes, * * * an award to a plaintiff for lost future earnings based upon lost gross earnings gives the plaintiff more than is truly compensatory." Accordingly, the court of appeals remanded the case to the district court with directions to adjust the damages awarded for impairment of Flannery's earning capacity to reflect that his loss is net income after taxes, not gross income (*id.* at 6a).

Third, although the government had not raised the issue on appeal, the court of appeals held (Pet. App. 7a-8a) that, because of the particular way in which the district court had calculated Flannery's "medical" expenses, that award impermissibly duplicated the award for lost future earnings. As the court of appeals noted (*id.* at 7a), included in the damages awarded by the district court for future "medical" expenses was "a sum calculated to provide for [Flannery's] living expenses throughout the remainder of his life." Accordingly, the court held (*id.* at 7a-8a), inasmuch as damages for lost future earnings are awardable "to an incapacitated plaintiff so that he may provide for himself * * * those necessities, comforts and niceties he would have provided out of his earned income had he not been injured," the district court's judgment, which included both elements of damages, improperly required the government "to pay [Flannery's] personal living expenses twice."

Judge Hall dissented (Pet. App. 9a-14a), largely on the ground (*id.* at 9a) that the "aspects of the damages award [challenged by the government] are a matter of state law." The dissent also was unconvinced that, as a matter of fact, "the award for lost

future earnings duplicates in part the award of future medical expenses" (*id.* at 13a).

ARGUMENT

The decision of the court of appeals is correct and entirely consistent with the purposes of the Federal Tort Claims Act. Moreover, the court's decision does not conflict with any holding of this Court or of any other court of appeals. Further review of this unusual case therefore is not warranted.

1. "[N]otwithstanding the generally interstitial character of the [FTCA], Congress, in waiving the immunity of the Government for tortious conduct of its employees, * * * imposed restrictions and conditions on the extent and substance of its liability." *Richards* v. *United States*, 369 U.S. 1, 7 (1962) (footnote omitted). One such restriction is that the government "shall not be liable for * * * punitive damages" (28 U.S.C. 2674). The court below followed the lead of other courts of appeals in concluding (Pet. App. 4a) that the prohibition of punitive damages in suits under the Act proscribes "an award [that] gives more than the actual loss suffered by the claimant." Accord, *Hollinger* v. *United States*, 651 F.2d 636, 642 (9th Cir. 1981); *Felder* v. *United States*, 543 F.2d 657, 668-669 (9th Cir. 1976); *D'Ambra* v. *United States*, 481 F.2d 14, 16-17 (1st Cir.), cert. denied, 414 U.S. 1075 (1973); *Hartz* v. *United States*, 415 F.2d 259, 264-265 (5th Cir. 1969).

The court of appeals relied in particular (Pet. App. 3a) on the First Circuit's reasoning in *D'Ambra*. *D'Ambra* involved an action under the FTCA brought by parents for the wrongful death of their four-year-old child in Rhode Island. Under the Rhode

Island statute, the parents were permitted to recover an amount equal to the estimated gross earnings of the child over his lifetime undiminished by the expenses he would have incurred on account of his anticipated dependents (481 F.2d at 16). Because the parents "would not have been the hypothesized wife and children to receive such earnings" (*ibid.* (footnote omitted)) and because, in any event, the gross earnings far exceeded the amount that would in fact have been available had the child survived, the court of appeals held that the award was prohibited by the FTCA, by which Congress had not intended "to accept liability over and above compensating the survivors to the extent of their loss" (*ibid.*).

Applying this principle to the particular facts of the instant case, the court of appeals correctly concluded (Pet. App. 4a-5a) that the award of $1,300,000 for the loss of the ability to enjoy life was not compensatory in nature. Where, as in this case, special damages have provided all of the money needed for a comatose plaintiff's maintenance and care, and recompensed fully his pecuniary losses, general damages can only be invested to draw income until the plaintiff's death, at which time they become a windfall to his heirs.

Contrary to petitioner's assertion (Pet. 7), there is no conflict between the decision below and *Kalavity* v. *United States*, 584 F.2d 809 (6th Cir. 1978). First, the question presented in *Kalavity* was an entirely different one, *i.e.*, whether the FTCA required that the amount of damages awarded to a widow for loss of her husband's support be reduced by the value of the support she "has or will receive by virtue of her subsequent remarriage" (584 F.2d at 810). Moreover, in holding that no reduction was required, the

court of appeals relied (*id.* at 811) on the fact that in calculating damages in tort "courts often exclude from consideration certain particular facts or uncertain future events in favor of a principle of uniformity." In particular, the court emphasized (*ibid.*) the difficulty that would be encountered by courts in applying such a rule, arising largely out of the speculative nature of the inquiry:

> [The court] would then have to consider the stability of the present marital or living arrangement, the strength of the relationship, the health of the new husband, the likelihood of death or separation, the amount of money the new partner contributes, the value of his companionship as compared to the deceased husband's. If the survivor is not yet remarried, the court or jury would have to consider her age, appearance and personality, her desire to marry again, and her chances of finding a marriage partner. The court or jury would also have to consider whether the survivor is telling the truth or simply trying to get a larger damage award if she says she will never remarry. Courts do not award "punitive" damages under the Tort Claims Act when they refuse to reduce damages by taking these kinds of considerations into account.

Finally, even assuming that the Sixth Circuit was correct in taking account of such factors as the difficulty of the damages calculation in determining whether certain types of damages are punitive, such an analysis would not yield a different result in this case. No uncertainty or speculation is involved in the elimination from recovery on behalf of a permanently comatose plaintiff of damages attributable to his loss of the ability to enjoy life.

Petitioner suggests (Pet. 7), however, that there is a conflict in principle between the court of appeals' construction of the FTCA's proscription of punitive damages as restricting recovery under the Act to "awards that compensate or reimburse" (Pet. App. 4a) and the *Kalavity* court's view (584 F.2d at 811 (footnote omitted)) that the FTCA does not mandate "a theory of damages which would exclude all customary damages awarded under traditional tort law principles which mix theories of compensation and deterrence together." But even the latter view does not avail petitioner, since damages awarded to a permanently comatose plaintiff for loss of the ability to enjoy life are hardly "customary * * * under traditional tort law principles" (*ibid.*).

To the contrary, there is no American precedent for awarding damages for loss of ability to enjoy life to a permanently and totally comatose plaintiff. See Note, *Nonpecuniary Damages for Comatose Tort Victims*, 61 Geo. L.J. 1547, 1556 (1973). Although a number of jurisdictions allow general damages to be awarded under rubrics other than the traditional category of pain and suffering, all have limited such damages to compensation for a plaintiff's "emotional sense of loss." Comment, *Loss of Enjoyment of Life —Should it be a Compensable Element of Personal Injury Damages?*, 11 Wake Forest L. Rev. 459, 470 (1975). Cf., *e.g.*, *Willinger* v. *Mercy Catholic Medical Center*, 482 Pa. 441, 447, 393 A.2d 1188, 1191 (1978) (survivor not entitled to damages for decedent's loss of ability to enjoy life because "it has been the plaintiff's consciousness of his or her inability to enjoy life that we have compensated under the rubric of 'loss of life's pleasures' "). The West Virginia Supreme Court of Appeals' ruling that damages for loss

of the ability to enjoy life are recoverable on behalf of a permanently comatose plaintiff thus is apparently unique among American jurisdictions.[1] While it surely was within the province of that court to adopt such a rule as a matter of state law, this rule of recovery equally as surely cannot be characterized as "customary damages awarded under traditional tort law principles," *Kalavity*, 584 F.2d at 811, even if that were the controlling criterion for recovery under the FTCA.

2. The decision below also presents no conflict among the circuits concerning the question whether damages for lost future earnings awarded under the FCTA should be reduced by the amount of income taxes such earnings would have borne. To the contrary, both of the other courts of appeals that have squarely considered the question whether the failure to make such an adjustment constitutes an award of punitive damages have agreed with the court below (Pet. App. 4a-6a) that it does. See *Harden* v. *United States*, 688 F.2d 1025, 1029-1030 (5th Cir. 1982); *Hollinger* v. *United States*, 651 F.2d at 642; *Felder* v. *United States*, 543 F.2d at 669-670.[2]

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[1] We note that, in holding as it did, the West Virginia Supreme Court of Appeals cited no other decision to the same effect.

[2] Other courts of appeals also have held that damages for lost earnings awarded under the FTCA should be reduced by the amount of income taxes that would have been incurred, but they apparently have done so on the ground that state law required such an adjustment without reaching the question whether the FTCA's ban on punitive damages mandated the same result. See, *e.g.*, *Deweese* v. *United States*, 576 F.2d 802, 808-809 (10th Cir. 1978); *Downs* v. *United States*, 522 F.2d 990, 1005 (6th Cir. 1975); *O'Connor* v. *United States*, 269 F.2d 578, 584-585 (2d Cir. 1959).

Petitioner's reliance (Pet. 8) on *Kalavity* v. *United States*, *supra*, is misplaced in this context as well. First, the court in *Kalavity* concluded that the damages award should not be reduced by the amount of income taxes the decedent would have been required to pay without even discussing the punitive nature of such an award. See 584 F.2d at 812-813. Moreover, the Sixth Circuit's decision in *Kalavity* predated this Court's decisions in *Norfolk & Western Ry.* v. *Liepelt*, 444 U.S. 490, 493-496 (1980), and *Jones & Laughlin Steel Corp.* v. *Pfeifer*, No. 82-131 (June 15, 1983), slip op. 10, which held that damages for lost future earnings awarded under the Federal Employers' Liability Act, 45 U.S.C. 51 *et seq.*, and the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 904, must be reduced to reflect income tax liability. Although this Court's construction of the amount of damages recoverable under other statutes is not strictly controlling in the FTCA context, it is far from certain that the Sixth Circuit would reach the same result today, in view of the analysis employed in *Kalavity* (584 F.2d at 812-813). Finally, even the *Kalavity* court suggested (*id.* at 813) that the rule stated therein would be limited to the " 'lower or middle reach of the income scale' "; the decedent in that case earned $6,600 per year at the time of his death in 1967 and, according to the court's estimate, would have been earning $12,800 per year at the time of trial (*ibid.*). By contrast, the projections accepted by the district court in this case indicated that Flannery would have earned from $17,481 in 1978 to $182,795 in 2017 (Pet. App. 6a). In these circumstances, it cannot be said that the Sixth Circuit would have decided this case differently, even if

Kalavity remained the controlling law in that circuit.[8]

Petitioner further contends (Pet. 8-9) that the government's evidentiary showing was insufficient to justify the court of appeals' conclusion that the damages for lost future earnings must be adjusted by 10% to reflect income taxes. This factual argument plainly is not worthy of this Court's review. In any event, the court of appeals' reasoning on this point is persuasive (see Pet. App. 6a), and the 10% adjustment suggested by the government—an adjustment described by the court below as "a very conservative estimate" (*ibid.*)—is consistent with the methodology that has been employed in other cases. See *Mosley* v. *United States*, 538 F.2d 555, 558 (4th Cir. 1976) (rate not challenged by either party on appeal); *Brooks* v. *United States*, 273 F. Supp. 619, 632 (D.S.C. 1967).

3. Petitioner's final argument (Pet. 9) is based on a misapprehension of the court of appeals' holding. Contrary to petitioner's assertion (Pet. 9 (emphasis by petitioner)), the decision below does not question that "future medical expenses and the impairment of earning capacity are proper *separate* elements of recovery." Rather, the court of appeals sim-

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[8] As the *Kalavity* court noted (584 F.2d at 813), in *Felder* v. *United States*, *supra*, the Ninth Circuit did not disavow its prior decisions in which income taxes were not deducted from lost earnings in the " 'lower or middle range of the income scale' " (543 F.2d at 670). However, while the projected incomes of the decedents in *Felder* ranged between $30,000 and $125,000 (*id.* at 669), the court made clear (*id.* at 670) that a yearly income of $15,000 "would fall near the top" of this lower or middle range. See also *Harden* v. *United States*, 688 F.2d at 1030 n.3 (reduction for income taxes required where decedent's annual future earnings estimated at $12,500).

ply held (Pet. App. 7a-8a) that "[t]he label should not be permitted tc mislead us," and that where, as in the peculiar circumstances of this case, one particular basis for damages (personal living expenses) already was included within one of the above elements (future medical expenses), it should not be duplicated under the other (*ibid.*). In short, the court of appeals held that the district court had awarded duplicative damages by miscalculating, not that the elements of damages were intrinsically redundant.[4]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[4] Although the dissent questioned whether, as a matter of fact, the damages awards actually were duplicative (Pet. App. 13a-14a), this issue plainly does not merit the Court's intervention.

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